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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARGARITA SAZ, Plaintiff and Appellant, v. INDEPENDENCE GARDENS TOWNHOMES HOMEOWNERS ASSOCIATION, Defendant and Respondent.	B161403 (Los Angeles County Super. Ct. No. LC 057091)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael B. Harwin, Judge. Affirmed.

Law Offices of Humberto Guizar and Humberto Guizar for Plaintiff and Appellant.

Barry Bartholomew & Associates and Kathryn Albarian, for Defendant and Respondent.

The underlying issues in this case involve negligence and premises liability. An unknown assailant assaulted and robbed a homeowner in the common area of a condominium complex. The trial court found the third party criminal assault unforeseeable as a matter of law and concluded the homeowners' association thus owed no duty to the plaintiff. We agree the total absence of evidence of prior similar criminal assaults on the premises made the assault at issue in this case unforeseeable as a matter of law. Accordingly, we affirm the summary judgment entered in favor of the homeowners' association.

FACTS AND PROCEEDINGS BELOW

Appellant Margarita Saz purchased a condominium in the Independence Garden Townhomes complex in the summer of 2000.

On December 25, 2000, Saz went to her friends' house to celebrate Christmas and came home alone around 1:00 a.m. She drove her car into the gated underground parking garage of the Independence Garden Townhomes. The gate was closed when she arrived and she pressed a button on a remote control in her car to open the garage door. Saz noticed an African-American male in his late twenties leaning against a tree on the street near the security gate to the garden. She had never seen the individual before. After getting out of her car, she saw the individual approach the closed garage door and then back up away from it.

Saz exited the parking structure by taking the stairs into a garden area on the first floor. Just as Saz reached the last step of the stairs, a man lunged toward her from an area near the security fence. This portion of the fence was missing a bar. He demanded Saz's purse, and said, "Give me your bag, bitch." The assailant grabbed her purse. He punched, kicked and dragged Saz on the ground when she tried vainly to hold onto her purse. Saz observed her assailant exit the condominium complex with

her purse through the security door in the garden which leads to Independence Street.[1] The assailant was never identified or caught by police.

Saz did not hear the gate door leading from the street to the garden area open and heard no other noise before she was attacked.[2] She would have heard the gate open because it squeaked loudly whenever anyone opened it. Because she heard no sounds, she was certain her assailant entered the premises through the gap in the security fence, although Saz admitted she did not actually see the assailant enter the garden area. According to Saz, the security fence with the missing bar created a gap which was big enough for a person to squeeze through, and thus she assumed her assailant had gained access in this manner.[3]

Saz purchased her condominium unit expecting a safe environment because it was a security building which strictly limited access to the complex to only owners and residents of units. When she purchased her condominium she did not observe any missing bars on the security fence. Saz stated she would not have purchased the unit if any of the bars were missing because it would have compromised her sense of security.

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[1] In her deposition on April 11, 2002, and in her declaration executed on June 26, 2002, Saz stated she observed her assailant exit through the security door of the garden. In her earlier response to special interrogatories on March 5, 2002, by contrast, Saz had stated the assailant "escaped through the gap in the security fence."

[2] There is no evidence whether the metal security gate of the garden which leads to the street was locked or unlocked at the time. There is similarly no evidence whether the condominium complex had entrances other than the garage gate and the security gate. Saz did state in her deposition the security gate can only be opened from the inside. However, there is no evidence the security gate was working properly. There is also no evidence whether residents or tenants regularly prop open the security gate for their convenience.

[3] Saz did not provide evidence of the physical dimensions of the gap created by the missing bar. Although Saz provided photographs of the security fence, the photographs did not have measurement scales to indicate the physical dimensions of the fence. Moreover, the photographs were taken after the fence had been repaired.

Saz had noticed the broken metal bar approximately two months before the incident. She did not make any complaints to the homeowners' association, but immediately notified Charlotte Bell who was on the homeowners' association board and lived on the property. Bell assured her at the time of her complaint the missing bar would be corrected immediately. However, the missing bar of the security fence was not replaced until after Saz was attacked in this incident.

Charlotte Bell, the homeowner members of the Independence Garden Townhomes Homeowners Association and its board members were present during a homeowners' meeting a few weeks before the incident. At this meeting homeowners voiced concerns about the missing section of the security fencing through which an intruder might enter the premises and cause serious injury or harm to residents. In Saz's answers to special interrogatories, she stated she learned from homeowners' meetings "numerous break-ins" had occurred in the garage prior to her attack.

On November 29, 2001, Saz filed a complaint against respondent Independence Garden Townhomes Homeowners Association (association). Her complaint alleged general negligence and premises liability based on the association's failure to fix the security fence with the missing bar. The association moved for summary judgment on July 17, 2002. It supported its motion with excerpts from Saz's deposition testimony, as well as with declarations from Terri Cook[4] and Charlotte Bell.[5] The association argued it owed no duty to Saz because it had no knowledge of prior similar incidents of violent crime on the premises.[6] Based on Bell's declaration, the association argued

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[4] Terri Cook was the property administrator for the condominium complex at the time of the incident.

[5] Charlotte Bell was the president of the Independence Garden Townhomes Homeowners Association at the time of the incident.

[6] In her declaration, Terri Cook stated she had "no knowledge of any prior similar violent incidents occurring in any of the common areas of the property prior to the December 25, 2000, incident at issue in this case." Charlotte Bell stated she was "unaware of any similar violent incidents occurring in any of the common areas of the property prior to the December 2000, incident at issue in this case." Cook also declared this incident was the first of its kind ever occurring on the property. Bell,

the attack on Saz was the first incident of its kind on the premises. The association pointed out the only known criminal incident on the premises prior to the attack on Saz was a vehicle vandalism incident involving property damage. Therefore, the association argued the attack on Saz by a third party criminal was not foreseeable or reasonably anticipated, and thus it had no duty to take affirmative action to control this third party's criminal conduct.

In the alternative, the association argued, even if a duty was owed to Saz, and the association breached its duty, such breach was not the proximate cause of Saz's injuries. The association supported its contention of lack of causation with Saz's deposition testimony in which she opined the assailant entered through the gap in the security fence next to the door because the missing bar created a gap large enough for a person to go through. The association argued since Saz conceded she did not actually know how the assailant gained access, her opinion how the assailant entered the premises was mere speculation. Because the assailant could have entered the property any number of ways other than through the security fence with the missing bar, the association argued a working security fence would not have necessarily prevented the attack.

Saz filed opposition. Saz argued the association owed her a duty because it made representations of security and restricted access to the premises and she relied on those representations when she purchased her condominium. She thus asserted the association had breached its duty to her by failing to fix the fence. Saz also argued it was a material issue of fact whether the assailant entered the premises through the gap in the security fence making summary judgment inappropriate. Saz supported her contention the assailant entered through the gap in the security fence with her declaration in which she explained she did not hear a squeaky noise which the security

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however, declared she knew of one incident of vehicle vandalism in the parking garage occurring approximately one or two months prior to Saz's attack. Apparently, the parking area was broken into and a CD player was stolen out of a car parked in the garage. However, Bell declared no physical violence occurred.

gate would have made had the assailant entered through the gate. Saz argued it was reasonable to infer the assailant entered through the gap in the security fence with the missing bar because she did not hear any noise. She therefore argued the question whether the assailant actually entered through the gap in the security fence should be determined by the jury.

Saz also argued the association had actual knowledge of the missing bar on the security fence because she had complained to Bell about the problem two months before the incident. Saz supported her contention of the association's actual knowledge of the missing bar with her declaration in which she explained she immediately notified Bell after noticing the missing bar of the security fence and Bell assured her of immediate correction. Because the association had actual knowledge of this dangerous condition, Saz argued they had compromised the security of the residents by allowing criminals to easily gain access to the complex thereby exposing residents to an unreasonable risk of harm. Saz thus asserted the association's failure to fix the security fence in a timely fashion was the proximate cause of her injuries.

At the hearing on the motion for summary judgment the court stated, "[t]he actual first issue is whether or not there's a duty, not how it happened. You need to get by duty first." Saz argued there was a duty owed because the association had made the representation of a secure building and she had purchased her unit with the expectation of security. Also, because fixing the metal bar was inexpensive, and the risk of criminal assault so great, the failure to do so established the association owed a duty to homeowners like Saz. Saz argued the causation issue – whether the assailant entered through the fence because of the missing bar – was one of fact to be decided by the jury.

The association argued, in the absence of prior similar acts of violence on the premises courts have held as a matter of law there is a lack of foreseeability, and therefore no duty. In opposition, Saz argued because the opportunity to commit crime on the premises was established by the fact of the missing bar, there is no requirement of prior similar criminal acts.

The court agreed with the association. The court reasoned, "[b]efore you get to [the causation element], you need to establish there was some kind of notice of the danger that there was some kind of prior incident that would put the defendant on notice. I'm just not satisfied that this is here in this case, these facts. . . . I'm not satisfied that there was sufficient notice here to establish a duty."

Finding the association owed no duty in these circumstances, the trial court found it was entitled to summary judgment as a matter of law. The trial court thus granted summary judgment in the association's favor and dismissed the action. Saz appeals.

I. STANDARD OF REVIEW OF A SUMMARY JUDGMENT.

"Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding."[7] "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[8] The evidence supporting a defendant's motion can consist of "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken."[9] A defendant moving for summary judgment is not required to "conclusively negate an element of the plaintiff's cause of action."[10] However, the defendant must "present evidence, not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence."[11] "A defendant or cross defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that

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[7] Code of Civil Procedure section 437c, subdivision (a).

[8] Code of Civil Procedure section 437c, subdivision (c).

[9] Code of Civil Procedure section 437c, subdivision (b).

[10] *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).

[11] *Aguilar, supra,* 25 Cal.4th 826, 854.

one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action."[12]

A reviewing court "must independently examine the record to determine whether triable issues of material fact exist."[13] In a de novo review evidence is viewed "in a light favorable to plaintiff as the losing party (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107), liberally construing her evidentiary submission while scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor."[14]

We review the summary judgment in the association's favor with these standards in mind.

II. THE TOTAL ABSENCE OF EVIDENCE OF PRIOR CRIMINAL ASSAULTS MADE THE ASSAULT IN THE PRESENT CASE UNFORESEEABLE AS A MATTER OF LAW AND THUS THE ASSOCIATION OWED NO DUTY TO PROTECT AGAINST THIRD PARTY CRIMINAL CONDUCT ON ITS PREMISES.

The plaintiff in a negligence action "must show that defendants owed her a legal duty, that they breached the duty, and that the breach was a proximate or legal cause of her injuries.[15] The existence of a duty is a question of law for the court.[16] In determining the existence of duty in the case of third party criminal conduct,

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[12] Code of Civil Procedure section 437c, subdivision (p)(2).

[13] *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*).

[14] *Saelzler, supra,* 25 Cal.4th 763, 768.

[15] *Saelzler, supra,* 25 Cal.4th 763, 767, citing *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673 (*Ann M.*).

[16] *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188 (*Sharon P.*); see also, *Kentucky Fried Chicken of Cal., Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819; *Ann M., supra,* 6 Cal.4th 666, 674.

foreseeability is a crucial factor.[17] "[F]oreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court."[18]

It is well established landowners are required to "maintain their premises in a reasonably safe condition, and . . . the general duty of maintenance includes 'the duty to take reasonable steps to secure common areas against *foreseeable* criminal acts of third parties that are likely to occur in the absence of such precautionary measures.'"[19] However, the "'duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated.'"[20] This requirement applies in the context of residential condominiums as well.[21] A condominium association "function[s] as a landlord in maintaining the common areas of a large condominium complex and, thus has a duty to exercise care for the residents' safety in those areas under its control."[22]

The scope of a duty to provide protection from foreseeable third party crime is "determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed."[23] As the Supreme Court explained in *Ann M. v. Pacific Shopping Center*,[24] if the burden of preventing future harm in a particular case is great, then a high degree of foreseeability is required.[25] However, if there are "'strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a

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[17] *Ann M., supra,* 6 Cal.4th 666, 676.

[18] *Sharon P., supra,* 21 Cal.4th 1181, 1188, quoting *Ann M., supra,* 6 Cal.4th 666, 678.

[19] *Sharon P., supra,* 21 Cal.4th 1181, 1189, citing *Ann M., supra,* 6 Cal.4th 666, 674, italics added.

[20] *Sharon P., supra,* 21 Cal.4th 1181, 1189, citing *Ann M., supra,* 6 Cal.4th 666, 676.

[21] *Ann M., supra,* 6 Cal.4th 666, 676.

[22] *Ann M., supra,* 6 Cal.4th 666, 676, citing *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 499.

[23] *Ann M., supra,* 6 Cal.4th 666, 678, citing *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 125.

[24] *Ann M., supra,* 6 Cal.4th 666.

lesser degree of foreseeability may be required.'"[26] In another words, duty is "determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy of the proposed security measures."[27]

In *Ann M.*, the plaintiff was raped by an unknown assailant in the photo store where she worked.[28] The plaintiff filed suit alleging the shopping center was negligent in failing to provide adequate security to protect her from the rape.[29] The plaintiff presented no evidence to suggest the shopping center had knowledge any criminal conduct had occurred on the premises prior to her rape.[30] The shopping center filed a motion for summary judgment, claiming it owed no legal duty to the plaintiff because the attack was unforeseeable.[31] The trial court granted summary judgment in favor of the shopping center and the plaintiff appealed.[32] The Court of Appeal affirmed. The Supreme Court then granted review and also affirmed.[33] As the court explained, even assuming the shopping center had notice of prior criminal incidents, they were not similar in nature to the violent assault she had suffered and thus the attack was unforeseeable.[34]

The plaintiff contended the shopping center should have hired security patrols to protect her on the premises. The court disagreed. In analyzing the duty to be imposed on such a defendant the *Ann M.* court reasoned, "[w]hile there may be circumstances where the hiring of security guards will be required to satisfy a landowner's duty of care, such action will rarely, if ever, be found to be a 'minimal

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[25] *Ann M., supra,* 6 Cal.4th 666, 678.
[26] *Ann M., supra,* 6 Cal.4th 666, 678.
[27] *Ann M., supra,* 6 Cal.4th 666, 678.
[28] *Ann M., supra,* 6 Cal.4th 666, 671.
[29] *Ann M., supra,* 6 Cal.4th 666, 672.
[30] *Ann M., supra,* 6 Cal.4th 666, 671.
[31] *Ann M., supra,* 6 Cal.4th 666, 672.
[32] *Ann M., supra,* 6 Cal.4th 666, 673.
[33] *Ann M., supra,* 6 Cal.4th 666, 673.
[34] *Ann M., supra,* 6 Cal.4th 666, 680.

burden.' The monetary cost of security guards is not insignificant. Moreover, the obligation to provide patrols adequate to deter criminal conduct is not well defined. 'No one really knows why people commit crime, hence no one really knows what is "adequate" deterrence in any given situation.' (*7735 Hollywood Blvd. Venture v. Superior Court* (1981) 116 Cal.App.3d 901, 905.) Finally, the social cost of imposing a duty on landowners to hire private police forces is also not insignificant."[35]

For these reasons, the *Ann M.* court found a "high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards."[36] Further, the court noted the "requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well-established policy in this state."[37] Finding the plaintiff did not provide sufficiently compelling evidence to establish the high degree of foreseeability required, the *Ann M.* court affirmed the summary judgment in favor of the shopping center.[38]

In the present case, there was evidence the association knew of only one prior incident of criminal conduct. This crime involved vehicle vandalism, decidedly dissimilar in nature to the attack on Saz. In addition, Saz did not provide evidence whether nearby condominium complexes or the general neighborhood had experienced violent crime. This lack of evidence of prior incidents of physical assaults on the premises or surrounding area tends to indicate the attack in the present case was possibly the first of its kind and as such was unforeseeable. These facts in turn negate the existence of a duty to protect association residents from third party criminal

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[35] *Ann M., supra,* 6 Cal.4th 666, 679.

[36] *Ann M., supra,* 6 Cal.4th 666, 679.

[37] *Ann M., supra,* 6 Cal.4th 666, 679.

[38] *Ann M., supra,* 6 Cal.4th 666, 680.

conduct.[39] Thus, there was no duty to breach and the failure to mend the fence cannot be the basis of a negligence action against the association.

We therefore conclude the association was entitled to summary judgment as a matter of law.

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[39] At oral argument, Saz argued proof of prior similar criminal acts on the premises was unnecessary because the association had assumed a duty to protect against third party criminal conduct by its act of installing a security fence. In support of this proposition we presume Saz relies on the decisions in *Mata v. Mata* (2003) 105 Cal.App.4th 1121 and *Trujillo v. G.A. Enterprises, Inc*. (1995) 36 Cal.App.4th 1105. These decisions are distinguishable. The settings of both cases were public retail establishments—a bar and a fast food restaurant. In both cases, the likelihood of rowdiness or violence must have been such the business owners had already taken the ultimate step of hiring security guards to protect patrons. In both cases the security guard failed to act reasonably to protect the establishments' customers from third party criminal conduct. In both instances the Courts of Appeal found that although the businesses had no duty to do so, once they hired security guards they assumed a duty to protect customers from criminal attack and thus could be liable for the guard's unreasonable behavior, even in the absence of evidence of prior similar criminal conduct. (*Mata v. Mata, supra*, 105 Cal.App.4th 1121, 1128-1129; *Trujillo v. G.A. Enterprises, Inc., supra*, 36 Cal.App.4th 1105, 1108.) In so reasoning, each court relied on the special relationship between a security guard and the businesses' customers. "A security guard is in a special relationship with the customers of the business that hired the guard. This special relationship imposes on the guard the obligation to act affirmatively to protect customers while on the premises. The security guard is liable to an injured customer when the guard fails to act reasonably and that failure causes injury. The business, in turn, may be liable for failing to hire a competent security guard. (*Trujillo v. G.A. Enterprises, Inc*. (1995) 36 Cal.App.4th 1105, 1108-1109 . . . .)" (*Mata v. Mata, supra*, 105 Cal.App.4th 1121, 1128-1129; but see, *Delgado v. Trax Bar & Grill* (2003) 109 Cal.App.4th 262, petition for review filed July 7, 2003, disagreeing with these courts' analyses and conclusions.)

In the present case the association did not hire security guards. It thus did not voluntarily assume an affirmative duty to protect all homeowners from criminal assaults by unknown third parties. It did no more than install a perimeter fence. A fence is, of course, an inanimate object and can have no affirmative duty to act. The decisions in *Mata* and *Trujillo* are thus inapplicable to the factual circumstances in the case at bar. Moreover, Saz acknowledged she could cite no authority for the proposition the act of installing a security fence was alone sufficient to establish the voluntary assumption of a duty to protect all persons on the premises from third party criminal activity.

DISPOSITION

The judgment is affirmed. Costs of appeal are awarded to respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, Acting P.J.

We concur:

WOODS, J.

MUNOZ, J.[*]

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[*] Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.